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22 November, 2004

The Honorable
James J. Jochum
Assistant Secretary for Import Administration
U.S. Department of Commerce
Central Records Unit
Rm. 1870
14th and Constitution Ave., N.W.
Washington, DC 20230

Re: Certification of Factual Information to Import Administration During Antidumping and Countervailing Duty Proceedings

Dear Mr. Jochum,

Please find attached comments of the European Commission on behalf of the European Communities in response to the notice of proposed rulemaking and request for comments published by the Department of Commerce in 69 FR 56738.

Sincerely,

Petros Sourmelis
Trade Counselor

2300 M Street NW Washington, DC 20037-1434 Telephone: (202) 862-9500 / Fax: (202) 429-1766

Certification of factual information to Import Administration during Antidumping and Countervailing Duty Proceedings

Comments of the European Commission on behalf of the European Communities

The European Commission (hereinafter the "EC") wishes to make its comments on the proposed changes in the US certification requirements on behalf of the *European Communities*.

Background

On 26 January 2004, the USDOC published in the Federal Register a *notice of inquiry* asking whether the current US certification requirements in AD and CVD investigations were sufficient or needed to be strengthen or modified.

Comments on the broader question of false statements to the US administration were also requested. Based on the comments received, on 22 September 2004 USDOC has proposed amendments on the language of the current US certification requirements. (69 FR 56738).

USDOC proposes to amend the certification requirements as follows. The new requirements would firstly include the specific date on which the submitted information is certified and the specific material to which the person is certifying. Lawyers or other company representatives supervising the answers to USDOC would be required to certify that the information provided is *"accurate and complete after an inquiry reasonable under the circumstances"*. Finally, the revised certification also includes a warning over the possible criminal sanctions against persons making false statements to the US Government.

EC's comments and suggestions

There is no need to modify the current practice.

As a major user of AD/CVD, the EC obviously has no interest in condoning the provision of false information in investigations. However, it is our opinion that the US Import Administration has already all the instruments necessary to ensure the accuracy and completeness of the factual information filed by the parties in a AD/CVD investigation, and to act upon the submission of anything which is false or misleading.

The EC understands that the new proposed regulations are a reaction to a single case where DOC believes that companies, with the possible knowledge of their counsel, deliberately filed misleading responses.

The exhaustive on the spot verifications carried out by the DOC and the transparent access to information by parties would seem to be a reliable mechanism for the *detection* of false information. Furthermore, the existence of legitimate provisions on the use of facts available are the appropriate instrument for *responding* to the provision of such information.

Nothing more would seem to be required. The EC does therefore not see any real need to change the current certification requirements for foreign companies participating to AD/CVD investigations.

However, the EC has attempted to approach the new US proposals in a constructive way. In this respect, the EC is of the opinion that only acceptable proposed amendments to the current US certification procedure are:

- the obligation to provide a certification form showing both the date of signature and
- the indication of the particular submission/proceeding at issue
- to keep a copy of each signed certification form as part of the data package for the spot verifications.

Impact of the proposed changes

In the 22 September 2004 notice, the USDOC states that the proposed changes in the certification requirements would have *"little or no economic impact on the companies or their legal or other representatives"*. DOC justifies this statement by explaining that the new requirements would require *"a small amount of additional supplemental information"*.

The EC does not agree. The wording used by USDOC on the responsibility of the person signing the certificate is vague enough to allow any possible legal interpretation. The problem is the uncertainty. Submissions in AD/CVD case can involve the provision of many thousands of pages of data, obtained from many sources, including related companies. It is unrealistic for one person to ensure its total accuracy. One major concern is that lawyers, in exercising their due diligence, may be required to spend far more time and effort on each submission than is currently the case. This would result in a significant increase of costs and workload for companies (and their lawyers) participating to an AD/CVD proceeding.

In light of the already prohibitive costs of an AD/CVD proceeding in the US, an increasing number of companies with insufficient financial resources (in particular SMEs) may decide not to participate in these proceedings. In this way, the "barrier to cooperation" will be raised further.

Consequently, there is a risk that these proposals could lead to increased recourse by the DOC to the use of "facts available"; time and resource constraints caused by the proposed provisions may make it impossible for firms to present factual submissions that they would otherwise have made.

The proposed new rules are not clear

Even if there was a basis for changing the rules, which the EC does not accept, changes in the certification regulations proposed by USDOC are vague enough to allow many different interpretations. As we said above, this excessive uncertainty should be avoided. The EC refers in particular to degree of discretion granted to the Administration when deciding whether the

inquiry carried out by the interested parties certifying a document is *"reasonable under the circumstances"*.

The EC would therefore expect that, before proposing any new change of its certification requirements, the US Administration clearly defines the new rules and explains what are the *minimum standards* to be met in order to avoid possible sanctions under the current trade and criminal law.

These standards must of course be reasonable and take into consideration the fact that in complicated proceedings like AD and CVD the possibility of a mistake or omission in *"bona fide"* clearly exists.

Conclusions

Contrary to what has been stated by USDOC, the proposed new rules, if not clearly and soundly defined, would damage the interests of foreign companies participating in AD and CVD investigations, without adding to the effectiveness of detecting or responding to abuses by a few unfair respondents. This will result in increased legal fees and even more burdensome obligations for all foreign parties. US AD and CVD proceedings are already expensive and time-consuming for respondents; this proposal would "raise the barrier" to cooperation. It will also create a climate of legal uncertainty which will destabilise the foreign exporters. As a result of the new regulations, many companies involved in AD and countervailing proceedings may also desist from participating any longer to US AD and CVD investigations and reviews.

The EC trusts that its comments will be duly taken into consideration and remains available to further discuss this issue with the US Administration.